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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No._____

UNITED STATES OF AMERICA

Plaintiff,

v.

JESUS ALVAREZ FRANCO

Defendant and Petitioner

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit has not been officially reported. It is printed in the appendix. The District Court did not

render an opinion.

JURISDICTION

The judgment of the Court of Appeals was filed and entered on July 17, 1972. A stay of mandate was issued by the said Court on August 7, 1972 pending the filing of this petition. There has been no order respecting a rehearing nor was there any order respecting an extension within which to file a petition for a writ of certiorari. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the manner in which the District Court interrogated defendant, because such interrogation could lead only to a finding of guilt, denied petitioner his right to a fair trial.

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The right of a criminal defendant to a fair trial in accordance with the Due Process Clause of the Fifth Amendment to the Constitution is the only constitutional provision involved.

The two statutes involved, and their provisions are:

18 U.S.C. 922(a)(6)

"It shall be unlawful --

* * *

"(6) for any person in connection with the acquisition of any firearm or ammunition from a licensed manufacturer, licensed dealer, or licensed collector, knowingly to make any false or fictitious oral or written statement or to furnish or exhibit any false, fictitious, or misrepresented identification, intended or likely to deceive such importer, manufacturer, dealer or collector with respect to any fact material to the lawfulness of the sale or other disposition of such firearm or ammunition under the provisions of this chapter."

18 U.S.C. 911

Citizen of the United States

"Whoever falsely and willfully represents himself to be a citizen of the United States shall be fined not more than $1,000 or imprisoned not more than three years, or both."

STATEMENT OF THE CASE

Petitioner was indicted by a Grand Jury on December 30, 1970 and charged with the violation of two federal statutes, both charges resulting from his decision to buy a handgun from a Stockton, California pawnshop.

Count I of the indictment charged petitioner with the violation of 18 U.S.C. 922(a)(6) by falsely denying at the time he bought the gun that he had never been convicted of a felony.

Count II charged him with falsely declaring himself to be an American citizen in connection with the same

purchase, a violation of 18 U.S.C. 911.

Upon the advice of court appointed counsel, petitioner waived his right to a jury trial and was tried by court in the District Court for the Eastern District of California.

On August 17, 1971, the court found petitioner guilty on both counts. The court sentenced petitioner to the maximum sentence of five years in prison on Count I and to the maximum three years on Count II, the terms to run consecutively. However, the court suspended all but six months imprisonment on Count I and all of the prison sentence on Count II. It ordered defendant placed upon probation for a period of five years and, as a condition of probation, ordered petitioner deported to Mexico and not to return without express written permission of the United States immigration

authorities and the District Court itself.

Petitioner appealed his conviction and sentence to the United States Court of Appeals for the Ninth Circuit. On July 17, 1972, the Court of Appeals affirmed the conviction but found the sentence illegal as an improper order of deportation and remanded the case to the District Court for resentencing.

REASONS FOR GRANTING THE WRIT

There is something wrong with the way this petitioner was convicted.

An illiterate farm worker, he was indicted on charges a busy prosecutor might not ordinarily bother with.

He was represented by court-appointed counsel, duly certified as competent to practice law, but who was inexperienced and made some bad mistakes at petitioner's trial.

He was tried by a judge whose interrogation of petitioner could lead only to a finding of guilt.

And his appeal was dismissed by three other judges who seemed more concerned with an administrative rule making them reluctant to interfere with a trial court's prerogatives than with the fundamental proposition that in the last analysis courts are created to render justice.

In short, the indictment was legally proper. Petitioner had a lawyer. A judge has the right to ask questions, and it is a right rarely interfered with by an appellate court. All the procedural niceties are observed. And yet a man may be done a terrible injustice. If lawyers and judges can understand how it happens, it remains a great mystery to ordinary people, and

particularly to this petitioner and his family who see an innocent man going to jail. There is something wrong and frightening about it all and that ought to be reason enough for the Supreme Court itself to get involved.

Petitioner's troubles with the law began about two years ago when he bought a hand gun in a nearby pawnshop. For most people, that would be a perfectly lawful act. But not for petitioner, because he is an alien and was convicted of a felony for helping other aliens to cross the border from Mexico in 1954. Federal law prohibits the sale of hand guns to convicted felons and California law permits the sale of such guns only to American citizens.

To buy the gun, petitioner signed two application forms, both completed by the pawnshop dealer, denying

conviction of a felony and declaring himself to be an American citizen. At the time, petitioner was 57 years old. He earns a meager living and has a large family to support. Aside from his conviction for aiding others to cross the border illegally, he has had no criminal convictions. And even that had taken place 16 years earlier. There was no evidence petitioner ever used the gun. In fact, he returned it to the pawnshop a week after he bought it, having learned it was illegal for him to have, and because he was afraid his children might find it and get hurt. In short, these were circumstances that might ordinarily convince a busy prosecutor not to bother.

This petitioner was not so lucky. Instead, he was indicted on charges of wilfully and knowingly making false

statements concerning his felony conviction and citizenship on the gun purchase application forms.

Petitioner's defense to the charge was that he could neither speak nor understand English and therefore did not willfully or knowingly make the false statements attributed to him in the application forms, such forms having been prepared by the English-speaking pawnshop dealer.

It seemed like a good defense because four disinterested witnesses, who had known petitioner as much as twenty years, all testified he could speak and understand only the most rudimentary words in English such as "good morning" and "water".

Nevertheless, on direct examination, under the guidance of his own lawyer, petitioner seemed to testify that he

understood at least two statements made to him in English by the pawnshop dealer, a Mr. Cassidy. The statements by Cassidy were to the effect that a $100.00 payment made by petitioner was only a down payment for the gun and that petitioner would have to return in five days to pick up the gun. (Reporter's transcript p. 73.) Petitioner's lawyer apparently was oblivious to the significance of what his client was saying.

Despite that particular bit of testimony, however, it is possible to conclude that petitioner was not actually referring to Cassidy but to a Spanish-speaking salesman who also worked in the pawnshop. Such a possibility might be drawn from petitioner's entire testimony in which he was continually and imprecisely referring either to one salesman or the other. Much of this

was done by imprecise use of the pronoun "he" in referring to the two salesmen. (In particular, compare petitioner's damaging testimony on page 72 with his further testimony on 74, 75 and 85 which would indicate that he may have meant the Spanish-speaking salesman, rather than Cassidy, had told him about the down payment and to return in five days.)

Instead of seeking clarification, however, the court indulged in the following interrogation of petitioner:

THE COURT: Mr. Alvarez Franco, I'm going to make a statement in English, and I want you to tell me what I have said, either in Spanish or in English.

THE INTERPRETER: He understands.

THE COURT: Listen carefully. You must return here five days from now. What have I said? You tell me.

THE WITNESS: It's the truth that

I don't understand absolutely anything you're telling me.

THE COURT: All right, one more statement. I'm going to say it in English to you, and you may tell me either in English or Spanish what I have said.

This is the first payment, you must make the rest of the payment later. What have I said? In Spanish tell me what have I said.

THE WITNESS: The problem is that I don't understand what you're telling me in English. If I understood, I could answer you in Spanish.

THE COURT: That's precisely what I want to know, is whether or not -- whether you understand what I'm saying to you in English.

THE WITNESS: No, I don't understand, but if I did, I would answer you in Spanish.

THE COURT: I'm satisfied.

(R.T. pp. 96,97)

Once again, petitioner's counsel sat by silently.

The matter was thereupon submitted to the Court and the Court made the following statement:

THE COURT: I listened with great care to the evidence in this case, and I'm convinced that the defendant is a fraud of the worst character. That he's neither been frank with the Court nor truthful. I'm sure that he is guilty of both of the crimes that are set forth in the indictment, and I so find him. I'm not at all certain that he hasn't committed perjury in this case, and I suggest to the government that it is a case that is not worthy of examination by the grand jury to determine whether or not this defendant has committed

perjury. Frankly, I'm outraged by people who commit perjury. These people can come into court and tell a complete untruth, an honest man hasn't got a chance. I believe that the defendant has been leading a life of deception ever since he entered the United States back in 1940, some thirty years ago. It would be hard for me to believe that he doesn't know English at all after being here thirty years. And the thing that convinces me he is a liar and a fraud, is the fact that he himself testified that Mr. Cassidy told him to come back in five days and he could get the gun. He now says he doesn't understand that statement when I say it to him. He himself testified that Mr. Cassidy told him that the hundred dollars was the first down payment and that he would have to pay the balance later. He now tells me that

he doesn't understand what I'm saying when I say that to him. His thought capacity might deteriorate inone direction, but it would not improve, I'm sure.

(R.T. 98, 99.)

The Court of Appeals could not find the trial court's interrogation to be improper. Yet that kind of interrogation in the context of petitioner's background and defense, by a District Court judge no less, is so unfair that it boggles the mind to think an appellate court could pass it by in the name of appellate restraint, or some such theory.

The duty of a trial judge in asking questions is to clarify testimony or evidence in order to get at the truth. This judge's questions could only have the opposite effect because they were

"damned if you do and damned if you don't" type of questions. In view of petitioner's defense, the judge could hardly have expected petitioner to say he understood the judge's statements. Yet when petitioner denied understanding them, the judge called petitioner a "fraud of the worst character", found him guilty, ordered him to prison and deportation from his wife and family who are all American citizens. Not once did the trial judge point out to petitioner the apparent inconsistency of his earlier testimony and ask for an explanation. That would have been the fair thing to do, particularly because petitioner's testimony, taken as a whole, literally begged for clarification.

Rule 19 of the Supreme Court rules indicates the Court gives consideration to the granting of a writ of certiorari

where a federal court has "so far departed from the accepted and usual course of judicial proceeding, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision."

If that means the Supreme Court ought to get involved in a case once in a while simply to prevent the occurrence of an injustice, then it ought to get involved in this case. The writ should be granted.

Dated at San Francisco, California, August 14, 1972.

Donald L. Ungar
Attorney for Petitioner

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff and Appellee,* vs. JESUS ALVAREZ-FRANCO, *Defendant and Appellant.*	No. 71-3070

[July 17, 1972]

On Appeal from the United States District Court for the Eastern District of California

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Before: CHAMBERS, MERRILL and WALLACE, Circuit Judges.

PER CURIAM:

The judgment of conviction is affirmed.

We cannot conclude that the interrogation conducted by the court was improper.

We think there was a sufficient showing of willfulness and knowledge.

We conclude that the form of sentence was not permissible under Dear Wing Jung v. United States, 312 F.2d 73 (9th Cir., 1962).

The case is remanded for resentencing.

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-257

JESUS ALVAREZ-FRANCO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury-waived trial in the United States District Court for the Eastern District of California, petitioner was convicted of having knowingly made false statements about his lack of a prior felony conviction (count 1) and his American citizenship (count 2), in violation of 18 U.S.C. 922(a)(6) and 911. He was sentenced to consecutive maximum prison terms on each count (five years and three years); all but six months of the entire sentence was suspended and petitioner was placed on probation on the condition that he be deported. The court of appeals affirmed

the conviction *per curiam*, but it found the sentence improper insofar as it related to deportation, and remanded the case for resentencing (Pet. App.).

As appears from the petition, petitioner's defense at trial was that his false statements were not knowingly made since he did not understand the questions asked by the dealer, when the dealer asked for information necessary to complete the official firearm application forms. In an effort to elicit the extent of petitioner's command and understanding of the English language, the trial judge in this non-jury case engaged in a brief colloquy with petitioner during his testimony (see Pet. 12-13). Partly on the basis of this colloquy, the judge found him guilty, indicating disbelief in petitioner's statements that he did not comprehend English.[1]

Petitioner seems to contend here that the judge's interrogation was unfair. There is, however, no basis for this conclusion. The judge's inquiry was designed to probe the veracity of the defense tendered to him and was well within the proper function of the judge in this court-tried case.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

SEPTEMBER 1972.

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[1] The court also noted that petitioner had entered the United States in 1940 and had been in this country for thirty years.

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